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ICO v. AKU

HIGH COURT MALAYA, KUALA LUMPUR
EVROL MARIETTE PETERS J
[DIVORCE PETITION NO: WA-33-260-05-2019]
7 MARCH 2023

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Abstract – *In assessing spousal maintenance in a case of a dissolution of marriage, the court is guided by the means and needs of the parties, and the maintenance is apportioned based on the degree of responsibility of each party. Under no circumstances should a divorce proceedings be used as a get-rich-quick scheme.*

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FAMILY LAW: *Dissolution of marriage – Breakdown of marriage – Claims for loss of consortium, damages for herpes and division of property – Whether wife solely responsible for irretrievable breakdown of marriage – Whether respondent wife contracted herpes from petitioner husband – Whether proved by medical evidence – Whether claim for damages for herpes statute-barred – Whether wife succeeded in 'means and needs' test for spousal maintenance – Whether both parties responsible for matrimonial property – Whether proceeds or shortfall to be divided – Law Reform (Marriage and Divorce) Act 1976, ss. 53 & 54(1)(b) – Evidence Act 1950, s. 114(g) – Limitation Act 1953, s. 6*

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EVIDENCE: *Adverse inference – Failure to call witness – Petition for dissolution of marriage – Claim for damages – Allegation that wife contracted herpes from petitioner husband – Whether supported by medical evidence – Whether medical expert called to testify – Whether deliberate withholding of witness – Whether attracted inference under s. 114(g) of Evidence Act 1950*

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This was a petition and cross-petition filed by the petitioner husband, an Australian citizen, and the respondent wife, a Malaysian, respectively, *inter alia*, to dissolve the marriage between them premised on ss. 53 and 54(1)(b) of the Law Reform (Marriage and Divorce) Act 1976 ('LRA'). The petitioner and the respondent, who met through an online dating, began a sexual relationship in October 2012. In November 2013, the petitioner moved from his rented serviced apartment to the respondent's home in Setia Alam where the parties cohabited before eventually registering their marriage on 1 June 2016. After the marriage, the petitioner, the respondent and her son from a previous marriage continued to reside at the respondent's home in Setia Alam. In November 2015, a property worth approximately RM1.85 million was purchased in the name of the respondent although both parties' names were documented in the loan agreement. Subsequently, the relationship between the parties deteriorated and the petitioner eventually moved out from Setia Alam after a major argument between the parties. The parties thereafter lived separately, and in May 2019, the petitioner filed the petition

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for divorce, whilst the respondent filed the cross-petition. Both the petitioner and the respondent agreed that the marriage should be dissolved, but issues arose regarding the property, a vehicle and spousal maintenance. The respondent had also cross-petitioned for loss of consortium and for damages for herpes, which she claimed she had contracted from the petitioner as early as October 2012.

Held (allowing petition and cross-petition in part):

(1) The petitioner's version as to why and how the marriage had irretrievably broken down was convincing in comparison to what was claimed by the respondent. He was candid in his answers during cross-examination and even testified that he had wanted very much for the marriage to work and that he tried but his efforts were in vain. The petitioner had to also put up with the respondent's son who was living with them, and this obviously caused a strain in the relationship between the petitioner and the respondent. On the other hand, the respondent's evidence contained numerous discrepancies and inconsistencies, which she had failed to explain during re-examination. Assessing the evidence in totality, the respondent was found to be solely responsible for the irretrievable breakdown of the marriage. (paras 23, 25 & 28)

(2) The respondent, having insisted that she was diagnosed with herpes, allegedly transmitted by the petitioner, claimed for RM1,500,000 as damages for pain and suffering as well as compensation for loss of consortium that resulted directly from the herpes. The respondent's cross-petition was filed pursuant to the Divorce and Matrimonial Proceedings Rules 1980, and ss. 53, 54 (1)(b) and 76 of the LRA. However, except for cases involving adultery, there is no provision for any form of damages, whether special or general, in the LRA. (paras 29 & 32)

(3) There was no evidence adduced from any medical expert, which was material to the facts of the present case. The explanation that the doctor was not free on the date scheduled for his appearance in court, and that the respondent had wanted to save judicial time, was unacceptable. This led to the inference under s. 114(g) of the Evidence Act 1950 that there was deliberate withholding of the witness for fear that the evidence from such witness would be unfavourable to the respondent. The respondent, despite claiming that the petitioner had transmitted herpes to her, had proceeded to continue the sexual relationship with the petitioner and even convinced him to move in with her, before eventually marrying him. The respondent was thus estopped from raising the issue of contracting herpes as she had fully acquiesced it. The respondent's allegations had not been established. (paras 36, 40, 42, 44 & 45)

(4) In any event, since the respondent's averment was that she first became aware of her condition in October 2012, her claim for damages due to contracting herpes from the petitioner had become statute-barred by virtue of s. 6 of the Limitation Act 1953, as her claim in her cross-petition was filed in July 2019. (para 46)

(5) The marriage had lasted merely two years. There were no children of the marriage, and it was the respondent who was responsible for the breakdown of the marriage. The respondent was capable of seeking employment and supporting herself, but refused to do so due to sheer inertia. The petitioner himself was struggling with his own financial commitments, as his work engagements had dwindled since outbreak of the COVID-19 pandemic. The respondent had therefore, failed the 'means and needs' test, rendering the claim for spousal maintenance, unjustified. In any event, bearing in mind the acrimony of parties, and the fact that the petitioner was a foreigner, the parties should have a clean break from each other post-divorce, to move forward without any more obligations towards each other. As such, the respondent's claim for maintenance was dismissed. (paras 59 & 66-68)

(6) The property was purchased as an intended matrimonial home and, except for the booking fee, the petitioner made all payments towards the loan obtained, although the respondent was registered as the sole proprietor. The property was purchased in the respondent's name because the petitioner had not qualified for ownership of such property pursuant to the rules in Malaysia governing foreign ownership of property. The respondent, despite claiming that the property was an unconditional gift to her, could not produce any evidence to corroborate her testimony. Hence, the property was ordered to be sold and the proceeds of the sale, if any, to be divided between the petitioner and respondent on a 70:30 basis. This division would apply also in the case of a shortfall, after the sale of the property. All costs incurred pursuant to the sale of the property, including unpaid maintenance fees should also be borne on a 70:30 basis. (paras 73, 74, 75, 82 & 84)

Case(s) referred to:

Adel Muhd El-Dabbah v. AG of Palestine [1944] AC 156 ***(refd)***

Ananth Kalyanasundram lwn. Nalineswari Puthiran [2013] 1 LNS 252 HC ***(refd)***

Anastasia Tikhonova v. Leonard Chong Kar Mun [2021] 1 LNS 658 HC ***(dist)***

Bellinger v. Bellinger [2001] EWCA Civ 1140 ***(refd)***

BM v. AR [2007] VCC 223 ***(dist)***

Choong Yee Fong v. Ooi Seng Keat; Chua Chong Hong (Joint Respondent) [2006] 5 CLJ 144 HC ***(refd)***

Dr Shameni Pillai PB Rajedran v. Dr S Arulselvam Sanggilly & Anor [2011] 6 CLJ 782 HC ***(refd)***

Hyde v. Hyde (1866) LR 1 P & D 130 ***(refd)***

Joseph Jeganathan v. Rosaline Joseph [1989] 2 CLJ 616; [1989] 1 CLJ (Rep) 645 HC ***(refd)***
Lee Hock Teong v. Ching Suet Yeen [2019] 1 LNS 1976 HC ***(refd)***
Marappan Muthusamy v. R Sivam Ramasamy [2013] 1 LNS 1381 CA ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Murugan v. Lew Chu Cheong [1980] 1 LNS 49 FC ***(refd)***
Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir' [2012] 1 LNS 1116 HC ***(refd)***
Shobana Perumal v. Ganesh Guna [2016] 3 AMR 806 ***(refd)***
Thevathasan v. Thevathasan [1960] 1 LNS 153 HC ***(refd)***
V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie [1999] 5 CLJ 474 HC ***(refd)***
Wong Kim Foong v. Teau Ah Kau [1998] 1 CLJ 358 HC ***(refd)***
Wong Siew Boey v. Lee Boon Fatt [1994] 2 SLR 115 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24
Evidence Act 1950, ss. 52, 103, 114(g)
Law Reform (Marriage and Divorce) Act 1976, ss. 53, 54(1)(b), 76, 77(1), 78
Limitation Act 1953, s. 6
Married Women Act 1957, s. 4A

For the petitioner - Keppy Wong & Wong Vi Vian; M/s Keppy Wong & Assocs
For the respondent - Renuka Devi Krishnasamy; M/s V Samy Renu & Co

Reported by S Barathi

JUDGMENT

Evrol Mariette Peters J:

Introduction

[1] This was a petition and cross-petition filed by the petitioner husband and respondent wife respectively to, *inter alia*, dissolve the marriage between them.

[2] Both petition and cross-petition were premised on ss. 53 and 54(1)(b) of the Law Reform (Marriage and Divorce) Act 1976 ("Law Reform (Marriage and Divorce) Act"), both of which read:

> Section 53 – Breakdown of marriage to be sole ground for divorce
>
> (1) Either party to a marriage may petition for a divorce on the ground that the **marriage has irretrievably broken down.**
>
> (2) The court hearing such petition shall, so far as it reasonably can, inquire into the facts alleged as causing or leading to the breakdown of the marriage and, if satisfied that the circumstances make it just and reasonable to do so, make a decree for its dissolution.

A Section 54 – Proof of breakdown

(1) In its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the court shall have regard to one or more of the following facts, that is to say:

B (b) that the respondent has **behaved in such a way** that the petitioner **cannot reasonably be expected to live** with the respondent; (emphasis added)

[3] In the interest of privacy and considering the sensitivity of the issues in these proceedings, the petitioner and respondent have been anonymised in this judgment respectively as ICO and AKU.

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The Factual Background

[4] This was a case of a love story that began on a dating website which subsequently turned into disillusionment and disappointment, culminating in a messy divorce which had left the parties in a huge debt pertaining to a D property which they had purchased.

[5] The petitioner, an Australian citizen aged 62, and the respondent, a Malaysian aged 49, met through an online dating website sometime in August 2012 before meeting face-to-face in September 2012. In October 2012, the parties had begun a sexual relationship, and a year later, in E November 2013, the petitioner moved from his rented serviced apartment in Tropicana City Tropics to the respondent's home in Setia Alam ("Setia Alam"), where the parties had cohabited before eventually registering their marriage on 1 June 2016.

F **[6]** After the marriage, the petitioner, respondent, and her son from a previous marriage continued to reside at Setia Alam.

[7] However, in November 2015, a property ("the property") worth approximately MYR1.85 million was purchased in the name of the respondent, although both parties' names were documented in the loan G agreement.

[8] The relationship between the parties deteriorated, and the petitioner eventually moved out from Setia Alam on 17 June 2018, after what was described as the 'incident', which was in actual fact, a major argument between the parties. The parties thereafter lived separately, and in May H 2019, the petitioner filed a petition for divorce ("the petition"), whilst the respondent filed a cross-petition in July 2019 ("the cross-petition").

[9] Both petitioner and respondent had agreed that the marriage should be dissolved, but issues arose regarding the property, a vehicle, and spousal maintenance. The respondent had also cross-petitioned for loss of consortium I and for damages for herpes, which she claimed she had contracted from the petitioner as early as October 2012.

[10] The petition and cross-petition were allowed only to the extent of the divorce, the vehicle, and the division of proceeds from the sale of the property. All other claims were dismissed for the following reasons.

Contentions, Evaluation, And Findings

Cause Of Breakdown Of The Marriage

[11] At the outset, the respondent described herself as a religious person and a devout Buddhist, who frequently helped out with non-governmental organisations 'to carry out activities, to feed the homeless people.' The respondent further submitted that the petitioner had admired these qualities in her which prompted him to pursue the respondent, with the intention of having a long-term relationship with her.

[12] In my view, there was no evidence whatsoever to establish that the respondent was a religious person, except for her own testimony, which in my view was an extensive embellishment of the truth. Secondly, even if it was true, s. 52 of the Evidence Act 1950 ("Evidence Act") renders irrelevant, evidence of character, whether good or bad, of any person. The provision reads:

> Section 52 – In civil cases character to prove conduct imputed irrelevant
>
> In civil cases the fact that the **character of any person concerned** is such as to render probable or improbable any conduct imputed to him **is irrelevant,** except so far as his character appears from facts otherwise relevant. (emphasis added)

[13] In fact, there was no reason for the respondent to extol her alleged virtues, in view of the fact that the issues before this court was to determine the cause of the breakdown of the marriage, and not to embark on an exercise to separate the saint from the sinner.

[14] The petitioner's case was that the respondent had caused the breakdown of the marriage due to what he described as 'her controlling, unyielding, selfish, vindictive nature and her ease at lying.' The respondent, on the other hand, claimed that the marriage had irretrievably broken down due to the petitioner's unreasonable conduct in imposing rigid house rules, such as specific and early times for dinner and bed, which she claimed was to ensure that there would be ample time for sexual intercourse with her on a daily basis, and as such, turning her into a sex slave.

[15] I found the respondent's narrative rather baffling, in view of the fact that it was she who had advertised herself on a dating website which catered specifically for Caucasian men seeking Asian women. She met the petitioner online and subsequently face-to-face sometime in August 2012. The respondent admitted that less than two months after their first meeting, they embarked on a sexual relationship, and a year later, she had convinced the

petitioner to move in with her before eventually getting married in June 2016. They cohabited for four years before getting married. There was no pressure on the respondent to enter into such a relationship, and it was the respondent who had indicated that her marriage to the petitioner was motivated by her claim that he had transmitted herpes to her and, as a result thereof, that he owed her loyalty and dedication simply because she felt that the herpes had prevented her from having sexual intercourse with anyone else but the petitioner. It was by no stretch of the imagination, therefore, that the respondent could have been turned into the petitioner's sex slave.

[16] In fact, I found that the respondent had exaggerated her living conditions with the petitioner, as it was obvious that the root of her dissatisfaction was her displeasure at the petitioner's lifestyle.

[17] It was unchallenged and undisputed that, in view of the fact that the petitioner, who was employed as a quality control geophysicist consultant, had a long commute to his workplace and back, he adhered to a daily routine and was a highly disciplined and regimented person. The respondent, on the other hand, who did not work, was unable to appreciate the importance of having a routine or regiment. The evidence had also showed that she frequently disrupted the petitioner's sleep by going to bed late and as a result, waking him at ungodly hours.

[18] It was also quite obvious from the evidence which included the undisputed emails and text messages, that when the novelty of the marriage had run out, the respondent felt increasingly bored and unfulfilled in the union.

[19] Despite the undisputed fact that the petitioner had borne expenses in raising the respondent's son and paid her a monthly sum of RM4,500, the respondent, who was always spoiling for a fight, continued to vent her dissatisfaction towards the petitioner over petty issues and occasionally publicised such dissatisfaction on social media. This was similar to the facts of the case of *Lee Hock Teong v. Ching Suet Yeen* [2019] 1 LNS 1976, and in my view, the respondent's conduct in publicising and airing issues and disputes in a marriage was extremely imprudent.

[20] The petitioner, on the other hand, was akin to a dormant volcano on the brink of an eruption, and that eruption occurred in mid-June 2018 when the petitioner fell ill a few days before, and the respondent had chosen that particular time to continuously antagonise him, leading to a showdown, as a result of which, the respondent had called the police and temporarily left Setia Alam with her son. The petitioner was left behind alone but after a couple of days, he left Setia Alam and never returned.

[21] I found instructive in the case of *Joseph Jeganathan v. Rosaline Joseph* [1989] 2 CLJ 616; [1989] 1 CLJ (Rep) 645; [1989] 3 MLJ 106, where the court held that the proper test to be adopted is whether a right thinking man, in all the circumstances, would conclude that the respondent had behaved in such a way that the petitioning spouse could not reasonably be expected to live with the respondent. In doing so, the court has to consider the circumstances holistically, including the characters and personalities of the parties.

[22] Reference was made also to the case of *Wong Siew Boey v. Lee Boon Fatt* [1994] 2 SLR 115, where it was held that the court must look at the behaviour of the parties by considering its cumulative effect, which includes active or passive conduct. The behaviour is not confined to behaviour towards the spouse but may have relevance to the marriage even if it is towards other members of the family or outsiders. All types of behaviour may be considered, including omissions, where it has reference to the marriage.

[23] In my view, the petitioner's version as to why and how the marriage had irretrievably broken down was convincing in comparison to what the respondent had claimed. He was candid in his answers during cross-examination and even testified that he had wanted very much for the marriage to work and that he tried but his efforts were in vain. The petitioner had to also put up with the respondent's son who was living with them, and this had obviously caused a strain in the relationship between the petitioner and respondent, as the respondent had on several occasions expressed her displeasure at how the petitioner had attempted to educate and discipline her son.

[24] The respondent, on the other hand, was perpetually dissatisfied in the marriage and this was evident by the undisputed and uncontroverted documentary evidence. She had refused to assume any responsibilities in the course that the marriage had taken.

[25] It was also crucial to note that the respondent's evidence contained numerous discrepancies and inconsistencies, which she had failed to explain during re-examination. She was overzealous in her narrative against the petitioner which contained several broadsides, but was evasive when the answers to the questions put to her were undeniably unfavourable. In fact, there was also an occasion where the proceedings were halted on the premise that the respondent was feeling unwell, but my observation was that she was unable to withstand the cross-examination by the petitioner's counsel simply because his line of questioning had revealed the numerous inconsistencies and disparity in her testimony. The respondent's evidence, therefore, had to be viewed with extreme caution.

[26] In the present case, based on the evidence and the testimony of the respondent, she had entered into the marriage with rose-tinted glasses, on the assumption that a Caucasian partner would give her a life that was different from the one she shared with her former Asian husband. Unfortunately for the respondent, when the novelty had run out, and the excitement and adrenaline rush were no longer, she became frustrated and disillusioned with the reality of her marriage and the lifestyle that the petitioner adopted.

[27] The petitioner, on the other hand, felt trapped and suffocated by the respondent, and her behaviour in general. He, too, was previously married and continued to support his daughter, who lives abroad. By his own admission, he thought that an Asian female partner would be docile, submissive and even servile. He obviously got more than he bargained for as he had to put up with not only the respondent, her idiosyncrasies and 'footloose and fancy-free' lifestyle, but with her teenage son as well. The petitioner obviously did not want to be saddled with more responsibilities that the respondent had expected him to assume. The strains and stresses of the marriage were too much for the petitioner to bear, and hence the incident in June 2018 was the straw that broke the camel's back.

[28] After assessing the evidence in totality, my finding was that it was the respondent who was solely responsible for the irretrievable breakdown of the marriage.

Whether Respondent Entitled To Claim Compensation For Contracting Herpes/ Loss Of Consortium

[29] Throughout the pleadings and in the course of the trial, the respondent had insisted that she was diagnosed with herpes, which she claimed was transmitted by the petitioner, and that she had been medically advised by the doctor not to have sexual intercourse with anyone, on the premise that herpes is a sexually transmitted disease. As a result of this allegation, the respondent pleaded an amount of MYR1 million as damages for pain and suffering caused by herpes and MYR500,000 as compensation for loss of consortium which she claimed had resulted directly from the herpes.

[30] In my view, the respondent's claim for MYR1.5 million was baseless, unsubstantiated, and had to be dismissed for the following reasons.

[31] I am mindful that this is a tortious claim, that is now generally allowed by s. 4A of the Married Women Act 1957, which reads:

> Section 4A – Capacity of husband and wife to sue each other for personal injuries
>
> A husband or a wife **shall be entitled to sue each other in tort for damages in respect of injuries to his or her person,** as the case may be, in the like manner as any other two separate individuals. (emphasis added)

[32] However, these proceedings were not brought pursuant to a civil suit. The respondent's cross-petition was filed pursuant to the Divorce and Matrimonial Proceedings Rules 1980, and ss. 53, 54 (1)(b) and 76 of the Law Reform (Marriage And Divorce) Act, as stipulated in the intitulement. It was, therefore, pertinent to note that, except for cases involving adultery, there is no provision for any form of damages, whether special or general, in the Law Reform (Marriage And Divorce) Act. On this point, I drew guidance from the cases of *Ananth Kalyanasundram lwn. Nalineswari Puthira*n [2013] 1 LNS 252 and *Shobana Perumal v. Ganesh Guna* [2016] 3 AMR 806. I also took note of the cases cited by the respondent including *BM v. AR* [2007] VCC 223. However, those cases were not concerned with a divorce petition, but were instead civil suits between parties.

[33] Although the respondent harped on the fact that she had contracted herpes from engaging in sexual intercourse with the petitioner, it was brought to the attention of this court that what the respondent had contracted was not herpes but was, in fact, herpes zoster. The petitioner's counsel claimed that based on his research, herpes zoster was nothing more than shingles and that it was not a sexually transmitted disease as claimed by the respondent.

[34] In view of the fact that the petitioner's counsel was not medically qualified, I took the view that he was not in a position to submit on the differences between herpes simplex and herpes zoster.

[35] Having said that, however, I took the view that, since it was a particular fact that the respondent had wanted the court to believe in, pursuant to s. 103 of the Evidence Act, the respondent therefore, had the burden of proving on a balance of probability that the herpes zoster she had supposedly contracted, was in fact transmitted by the petitioner, and that it was a sexually transmitted disease. She also had to prove that she was in fact advised not to engage in sexual intercourse with anyone. Section 103 of the Evidence Act reads:

> Section 103 – Burden of proof as to particular fact
>
> The burden of proof **as to any particular fact** lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> (emphasis added)

[36] In my view, the respondent had failed to reach that threshold of proof. Reference was made to the case of *Anastasia Tikhonova v. Leonard Chong Kar Mun* [2021] 1 LNS 658, where a specialist was invited to corroborate the findings of the laboratory report to reveal the truth of the respondent's allegations that the petitioner had contracted a sexually transmitted disease from a third party. Unlike that case, in the present one, there was no evidence adduced from any medical expert to explain the effects of the herpes zoster

on the respondent, whether it was a sexually transmitted disease, and whether it was true that the respondent was advised not to engage in sexual intercourse.

[37] The respondent had decided not to call her doctor or any medical expert to testify on her behalf, as she claimed that the court had instructed the parties to complete the examination of witness within a certain time. I found this argument bereft of merit as the court had allocated ample time for the respondent to call all her witnesses. However, she informed the court that the doctor whom she had intended to call was not available on the scheduled dates. In my view, the doctor's presence in court was the responsibility of the respondent, and his failure to attend could not be attributed to anyone but the respondent herself and her counsel.

[38] As such, the petitioner, pursuant to illustration (g) of s. 114 of the Evidence Act, urged the court to draw an adverse inference against the respondent for failure to call a medical expert to provide an opinion on the issues that she herself had raised. The provision reads:

> Section 114 – Court may presume existence of certain fact
>
> The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> ILLUSTRATIONS
>
> The court may presume:
>
> ...
>
> (g) that evidence which could be and is not produced would if produced be **unfavourable to the person** who withholds it; (emphasis added)

[39] As stated by the Supreme Court in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, evidence that is referred to in s. 114(g) of the Evidence Act must not only be relevant, it must be material.

[40] In my view, the medical expert was material to the facts of the present case as he would have been able to lend credence to the respondent's narrative that she had contracted herpes zoster through sexual intercourse, and that herpes zoster itself was a sexually transmitted disease.

[41] On this note, reference was made to the case of *Sabah Shell Petroleum Co Ltd & Anor v. The Owners Of And/Or Any Other Persons Interested In The Ship Or Vessel The 'Borcos Takdir'* [2012] 1 LNS 1116; [2012] 5 MLJ 515, where it was stated by Nallini Pathmanathan J (now FCJ):

> ... **The person best placed to explain fully the events of the day would have been the Master but the Defendant failed to call the master as witness.** Stating that he was uncooperative. Given the importance of this witness' evidence, the defendant's failure to subpoena him led this court to conclude that the master's evidence if produced, would affect the defendant adversely. This was a fit and proper case for this court to draw an adverse inference under s. 114(g) against the defendant.
>
> (emphasis added)

[42] A further aspect of the evidence referred to in illustration (g) of s. 114 of the Evidence Act is that an adverse inference is drawn only if there was deliberate withholding of the evidence. Deliberate withholding of the evidence is inferred from the lack of a reasonable explanation for the failure to produce the same: *Adel Muhd El-Dabbah v. AG of Palestine* [1944] AC 156, *Murugan v. Lew Chu Cheong* [1980] 1 LNS 49; [1980] 2 MLJ 139, and *Marappan Muthusamy v. R Sivam Ramasamy* [2013] 1 LNS 1381; [2014] 4 MLJ 428. In the present case, the explanation that the doctor was not free on the date scheduled for his appearance in court, and that the respondent had wanted to save judicial time, was unacceptable. This led to the inference that there was deliberate withholding of the witness for fear that the evidence from such witness would be unfavourable to the respondent.

[43] I had also found it bizarre that although the respondent claimed that she was in severe pain and agony on 12 October 2012, as a result of an outbreak of herpes zoster, photographs taken between 14 October 2012 and 19 January 2013 of both the petitioner and respondent cavorting blissfully on holiday, indicated otherwise. In my view, this was another incident of how economical the respondent was of the truth.

[44] It was also crucial to note that if the petitioner had in actual fact transmitted herpes to the respondent and destroyed her life as she claimed, it then begs the question why she had proceeded to continue the sexual relationship with the petitioner, and even convinced him to move in with her, before eventually marrying him. I had to, therefore, agree with the petitioner that the respondent was estopped from raising the issue of contracting herpes as she had fully acquiesced it.

[45] In the final analysis, the respondent had failed to prove all her averments with regard to the alleged herpes, which she claimed was transmitted by the petitioner. As such, the court had to conclude that the allegations had not been established.

[46] In any event, since the respondent's averment was that she first became aware of her condition in October 2012, her claim for damages due to contracting herpes from the petitioner had become statute barred by virtue of s. 6 of the Limitation Act 1953 ("Limitation Act"), as her claim in her cross-petition was filed in July 2019. Section 6 of the Limitation Act reads:

A Section 6 – Limitation of actions of contract and tort and certain other actions

(1) Save as hereinafter provided the following actions **shall not be brought after the expiration of six years** from the date on which the cause of action accrued, that is to say:

B (a) actions founded on a contract or on tort;

(b) actions to enforce a recognisance;

(c) actions to enforce an award;

(d) actions to recover any sum recoverable by virtue of any written
C law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture. (emphasis added)

[47] The respondent, however, contended that time had begun to run when the petitioner filed the petition in May 2019. This was premised on the respondent's claim that the petitioner had promised to remain married to the
D respondent, and look after her for life, as she claimed that the petitioner felt responsible and guilty for transmitting herpes to the respondent.

[48] In my view, this contention was bereft of merit for the following reasons. First and foremost, there was no evidence that the petitioner had made any such promise. Secondly, in view of the fact that the Law Reform
E (Marriage And Divorce) Act provides for grounds on which a marriage may be dissolved, even if such promise was in fact made, it was absolutely irrelevant and untenable in law. This is in line with s. 24 of the Contracts Act 1950, which renders such promises unlawful as it would defeat the law documented in the Law Reform (Marriage And Divorce) Act. Section 24 of
F the Contracts Act 1950 reads:

Section 24 – What considerations and objects are lawful, and what not

The consideration or object of an agreement **is lawful, unless**:

(a) it is forbidden by a law;

G (b) it is of such a nature that, **if permitted, it would defeat any law**;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

H (e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. (emphasis added)

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[49] At this juncture, it is apt to be reminded that although a marriage was traditionally described in *Hyde v. Hyde* (1866) LR 1 P & D 130, as 'the voluntary union for life of one man and one woman to the exclusion of all others', the more contemporary definition is found in *Bellinger v. Bellinger* [2001] EWCA Civ 1140, where Thorpe LJ described marriage as 'a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations'.

[50] Having said that, it is crucial to note that although a marriage is a contract, it must be differentiated from other commercial contracts. The dissimilarities were distilled by Abdul Malik Ishak J (as he then was) in the case of *Wong Kim Foong v. Teau Ah Kau* [1998] 1 CLJ 358, in the following passages:

> But a marriage contract is quite unlike a commercial contract and there are marked dissimilarities between the two. Of pertinence to note would be the following dissimilarities:
>
> (1) Special formalities are needed and must be fulfilled before a marriage vow is exchanged between the parties.
>
> (2) The law relating to capacity to marry is entirely different from that of, say, the sale of goods.
>
> (3) What are said to be void and voidable in a marriage can never be the same for other contracts.
>
> (4) A voidable marriage cannot be declared void ab initio by repudiation by one of the parties but it may be set aside by a decree of nullity pronounced by a divorce court.
>
> (5) A marriage once contracted cannot be discharged by agreement, frustration or breach.

[51] It would be ideal if marriages were discord-proof and lasted forever, but such marriages are found only in fiction and fairy tales. The traditional vows of a marriage are no longer applicable today, and as such, a marriage lasts only for as long as the parties intend it to, and not necessarily upon death.

[52] In the present case, there was no evidence that the petitioner had even given the respondent the guarantee that he would remain with her in the marriage until death did them apart.

[53] It was, therefore, untenable for the respondent to seek general damages in the amount of MYR1.5 million for her expectation that the petitioner promised to remain married to the respondent until death did them apart, on the premise that it was the petitioner who had transmitted herpes to her.

Whether Respondent Was Entitled To Maintenance

[54] The respondent claimed spousal maintenance from the petitioner in the monthly amount of MYR5,000. In determining the issue of maintenance, I am mindful of s. 77(1) of the Law Reform (Marriage and Divorce) Act which reads:

> Section 77 – Power of court to order maintenance of spouse
>
> (1) **The court may** order a man to pay maintenance to his wife or former wife:
>
> (a) during the course of any matrimonial proceedings;
>
> (b) when granting or subsequent to the grant of a decree of divorce or judicial separation;
>
> (c) if, after a decree declaring her presumed to be dead, she is found to be alive. (emphasis added)

[55] I took the view that the respondent was not entitled to any maintenance, for the following reasons.

[56] First and foremost, in s. 77(1) of the Law Reform (Marriage and Divorce) Act, reference is made to the word 'may' which is indicative that the court has the discretion in determining if, at all, the respondent was entitled to maintenance. I am compelled to state, at this juncture, that there is no hard and fast rule that a man must maintain his wife or former wife. It must be remembered that the provisions of the Law Reform (Marriage and Divorce) Act were discussed, deliberated and determined during a time when the demarcation of the roles of husband and wife were clear, where most women were stay-home mothers and were financially dependent on their husbands who were the breadwinners for the family.

[57] However, a whole generation has transitioned since the Law Reform (Marriage & Divorce) Act was enacted and along with it, the traditional roles of husband and wife have evolved. Women are no longer relegated to merely handling household-matters. As such, there is no automatic right for a woman to claim maintenance from her husband, especially if she is capable of earning and supporting herself. All factors must be considered for this court to determine if maintenance from the petitioner was justified.

[58] In determining if the respondent was entitled to maintenance, I was guided by the cases of *Dr Shameni Pillai PB Rajedran v. Dr S Arulselvam Sanggilly & Anor* [2011] 6 CLJ 782 and *V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie* [1999] 5 CLJ 474, where the following factors were considered, namely:

(i) the income, earning capacity, property or financial resources which each party has or is likely to have in the foreseeable future;

(ii) the financial needs, obligations and responsibilities which each party has or is likely to have in the foreseeable future;

(iii) the standard of living enjoyed by the family before the marriage breakdown;

(iv) the age of each party and the duration of the marriage;

(v) health, physical or mental disability of the parties; and

(vi) the respective contributions by the parties to the welfare of the family.

[59] In the present case, the marriage had lasted merely two years. There were no children of the marriage, and in my view, as alluded to earlier, it was the respondent who was responsible for the breakdown of the marriage.

[60] The respondent claimed that the petitioner had given her a monthly maintenance of MYR5,000, and that such amount should continue. I found such contention unacceptable, as it was quite clear that the petitioner had given the respondent such amount as rental, at her request. This was based on the amount of rental that he had paid towards his previous accommodation before he began to cohabit with the respondent in Setia Alam. The amount was received by the respondent from the petitioner as a tenant, and was not an amount that was contributed by the petitioner towards Setia Alam, as that home had already been fully paid up by the respondent's father.

[61] Furthermore, in exercising its discretion, the court is governed by the 'means and needs' test, pursuant to s. 78 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 78 – Assessment of maintenance
>
> In determining the amount of any maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on **the means and needs of the parties,** regardless of the proportion such maintenance bears to the income of the husband or wife as the case may be, **but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage.** (emphasis added)

[62] On this point, I found instructive the case of *Choong Yee Fong v. Ooi Seng Keat; Chua Chong Hong (Joint Respondent)* [2006] 5 CLJ 144, where it was stated by Faiza Thamby Chik J, in the following passage:

> It may be summed up that s. 78 of the Act requires *this court to assess the means and the needs of both the petitioner and the respondent* and also their respective conduct which contributed to the irretrievable breakdown of the marriage, in coming to a decision if the petitioner is entitle to a maintenance at all and if so, the amount to be awarded. In first assessing the means of the petitioner, attention is drawn to the petitioner's affidavit at para. 9 (encl. 76). The petitioner has averred therein that she was at one time until 2001, drawing a salary of RM1,800. The respondent in disclosing his financial ability at para. 17 to 24 of encl. 77 has averred that

A the average monthly income received by the respondent is RM2,800. The petitioner has been at all material time gainfully employed. *The petitioner is not in a situation where she is incapable of supporting herself but rather a case where there is an able-bodied petitioner who refuses to seek employment in order to claim for maintenance from the respondent.* This refusal to be self-supportive is further proven by the petitioner herself whereby despite of her alleged
B tight financial situation, the petitioner has shown total lack of initiative in mitigating her financial woes but has instead went on a spending spree as evidenced by her indiscriminate use of credit cards facilities which according to the petitioner's averment at para. 12(a) and (b) of encl. 76 amounts to a total sum of RM114,668.64. The potential earning power of
C the claimant must also be considered. (emphasis added)

[63] It was undeniable that the respondent had the capacity to earn. The significance of potential earning capacity of the spouse claiming maintenance was highlighted in the case of *Choong Yee Fong v. Ooi Seng Keat; Chua Chong Hong*, where in referring to the earlier case of *Thevathasan v. Thevathasan*
D [1960] 1 LNS 153, it was stated by Faiza Thamby Chik J in the following passage:

> *Therefore, applying the principle enunciated by the cases cited above, to the facts before me, it can be established that the petitioner who is 41 years of age, able bodied and until 2001 was earning a salary of RM1,800 per month certainly has earning potential with relevant past working experience which help enhances her earning*
> E *power in the market work force.* The petitioner has in her own affidavit at para. 13 and 14 of encl. 76 admits to renting out on the asset, namely the apartment at RM620 per month (with a market potential rental rate of RM700 per month see exh. CYF at encl. 79) whilst the instalment payment to the bank is RM470. This indicates that the petitioner earns
> F an income of RM150 per month from the apartment. *In gist, the petitioner has the means within the contemplation of s. 78 of the Act, to be self-sufficient and self-reliant.* It must be emphasized that the marriage though registered in 1984, has lasted for less than 10 years and with no children. Although the parties have since lived separately in 1994, the marriage, for all intents and purposes, has broken down irretrievably even before the physical
> G separation in 1994. The petitioner who was 31 years of age in 1994 was working and self-supportive until her alleged unemployment in 2001.
> (emphasis added)

[64] In the present case, at the time of the trial, the petitioner was 49 years old, able-bodied, and educated. As admitted by herself, she had led an
H independent life before meeting the petitioner. She was the owner of two businesses which she operated herself. Furthermore, she had no other expenses, as her former husband was still paying child maintenance.

[65] Although the respondent insisted that her two businesses were not flourishing, the communications between the petitioner and respondent had
I revealed that, despite the petitioner's plea for the respondent to seek

alternative employment, she was adamant in not doing so, and had even exclaimed in her messages to the petitioner that she 'would rather die than go out to work'.

[66] At this juncture, it was incumbent for this court to state that under no circumstances should divorce proceedings be used as a get-rich-quick scheme. The avarice displayed by the respondent could not be condoned by this court. The respondent was obviously capable of seeking employment and supporting herself, but refused to do so due to sheer inertia.

[67] To compound the matter, evidence indicated that the petitioner was now struggling with his own financial commitments, as his work engagements had dwindled since outbreak of the COVID-19 pandemic.

[68] In my view, the respondent had, therefore, failed the 'means and needs' test, rendering unjustified the claim for spousal maintenance. In any event, bearing in mind the acrimony of parties, and the fact that the petitioner is a foreigner, I took the position that the parties should have a clean break from each other post-divorce, in order to move forward without any more obligations towards each other. As such, I dismissed the respondent's claim for maintenance.

Division Of Matrimonial Assets

[69] The matrimonial assets concerned a vehicle and the property.

[70] The task of dividing the matrimonial assets is dictated by s. 76 of the Law Reform (Marriage and Divorce) Act, which reads:

> Section 76 – Power of court to order division of matrimonial assets
>
> (1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any **assets acquired by them during the marriage** or the **sale of any such assets** and the division between the parties of the proceeds of sale.
>
> (2) In exercising the power conferred by subsection (1) the court shall have regard to:
>
> (a) **the extent of the contributions made by each party** in money, property or work towards the acquiring of the assets or payment of expenses for the benefit of the family;
>
> (aa) **the extent of the contributions made by the other party** who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;
>
> (b) **any debts owing by either party** which were contracted for their joint benefit;
>
> (c) the needs of the minor children, if any, of the marriage;
>
> (d) **the duration of the marriage,**

A and subject to those considerations, the court shall incline towards equality of division.

...

(5) For the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party which have been substantially improved during the marriage by the other party or by their joint efforts. (emphasis added)

B

[71] At the outset, the court was informed that the petitioner had agreed that the vehicle, which he had fully paid for, could be retained by the respondent, and that the petitioner was relinquishing all claims to it.

C

[72] The issue of division of the property, however, had to be addressed as the respondent had insisted that the property was purchased by the petitioner as a gift to her, and that was why the property was in the respondent's sole name.

D **[73]** I found this submission to be ludicrous since the documentary evidence had clearly indicated that the only reason that the property was purchased in the respondent's name was because the petitioner had not qualified for ownership of such property, pursuant to the rules in Malaysia governing foreign ownership of property.

E **[74]** The property was purchased as an intended matrimonial home and, except for the booking fee, it was the petitioner who made all payments towards the loan obtained, although the respondent was registered as the sole proprietor.

F **[75]** After the marriage had broken down, the petitioner had ceased such payments towards the property, upon advice of his solicitors. He added that he was unable to continue payments since he had assumed the total financial responsibility towards the property, with no monetary contribution whatsoever from the respondent.

G **[76]** There were, however, attempts to sell the property. In fact, shortly after the petitioner had moved out of the Setia Alam, a prospective buyer had expressed his interest to purchase the property for MYR1.9 million. This was evidenced by the respondent's email. However, the respondent remained indifferent, and even removed the property from the listing on the market.

H **[77]** It was only after facing the threat of foreclosure, did the respondent hurriedly effect payment to prevent the same. However, because of the delay caused by the respondent, it became increasingly difficult to secure any buyer to purchase the property at a favourable or even market price.

[78] The respondent, on her averment that the property was a gift to her,
I insisted that the petitioner should make full payment towards the property, and that such property should remain solely in her name.

[79] I found the respondent's narrative perplexing and baffling. She claimed that the property was an unconditional gift to her, but could not produce any evidence whatsoever to corroborate her testimony. The only corroborative evidence that she had produced was the testimony of her son who in my view, was not convincing at all. In fact, his evidence had merely confirmed that the property was purchased in contemplation of the parties moving there eventually as a matrimonial home.

[80] It was also highly improbable that the petitioner, for no rhyme or reason, would want to gift the respondent with a property worth more than MYR1.8 million, in view of the fact that the respondent had already owned her own property in Setia Alam.

[81] Both petitioner and respondent also made claims against each other for payments that were made in relation to the property, with the petitioner claiming that the respondent had pocketed a rebate worth MYR80,000 that was granted by the developer, whilst the respondent claimed that she had to borrow MYR76,000 from her brother to pay off certain sums to the bank, to ensure that the property was not subject to foreclosure proceedings.

[82] In my view, both claims by the petitioner and respondent were untenable in view of the fact that both parties should have been financially responsible for the property. In any event, since the respondent had pocketed the rebate amounting to MYR80,000, there was no basis for her to claim the MYR76,000, which she averred was borrowed from her brother to service the loan repayment.

[83] In my view, the respondent had clearly sabotaged the potential sale of the property, making it increasingly difficult to secure a buyer, especially during the COVID-19 pandemic. The respondent's action in 'cutting off her nose to spite her face', had left the parties in a conundrum over the property, which in all probabilities would be sold at a price that would be less favourable to the parties.

[84] In all fairness, therefore, I ordered that the property be sold and the proceeds of sale, if any, to be divided between the petitioner and respondent on a 70:30 basis. This division would apply also in the case of a shortfall, after the sale of the property. All costs incurred pursuant to the sale of the property, including unpaid maintenance fees should be borne also on a 70:30 basis.

Conclusion

[85] In the upshot, therefore, and based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this court, as well as written and oral submissions of both parties, the petition and cross-petition were allowed only to the extent of the divorce, the vehicle, and a percentage of 70:30 division to the petitioner: respondent of the proceeds of sale/shortfall of the property.